In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 950

OTTER TAIL POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION AND
VILLAGE OF ELBOW LAKE, MINNESOTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1–9) is reported at 429 F. 2d 232. The initial opinion of the Federal Power Commission (Pet. App. B 1–17) is reported at 40 FPC 1262, and its opinion denying petitioner's application for rehearing (Pet. App. C 1–4) is reported at 40 FPC 1499.

JURISDICTION

The judgment of the court of appeals (Pet. App. A 10) was entered on August 4, 1970, and a petition for rehearing was denied on August 24, 1970 (Pet. App. D 8). The petition for a writ of certiorari was

filed on November 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether, pursuant to Section 202(b) of the Federal Power Act and upon the application of a municipally owned electric system, the Federal Power Commission may order a public utility subject to the Commission's jurisdiction to interconnect its electric power transmission facilities with those of the municipal system.

STATUTES INVOLVED

The pertinent provisions of Section 3(3), (4) and (7), and 202(b) of the Federal Power Act, 16 U.S.C. 796(3), (4) and (7), and 824a(b), are set forth at Pet. App. F 2-3.

STATEMENT

Petitioner, the Otter Tail Power Company, seeks review of a decision of the court of appeals upholding an order of the Federal Power Commission directing it to permit the Village of Elbow Lake, Minnesota, to establish at the village's expense a short-term interconnection with petitioner's facilities. Petitioner is subject to the Commission's jurisdiction under Section 201 of the Federal Power Act, 16 U.S.C. 824.

Until a municipally owned electric generating and distributing system was put into operation in 1966, the village had been supplied with power by petitioner (Pet. App. B 8). The municipal generating plant

consists of two generators each capable of generating 1136 kilowatts (kw) on a sustained basis and up to 1250 kw for two-hour periods (Pet. App. B 8). During the plant's first and second years of operation, the village experienced short-period peak loads of 1120 and 1245 kw, respectively (Pet. App. A 2). Recognizing that additional generating capacity would be needed to assure firm reliability to meet expected further increases in peak-period demand (Pet. App. B 9),[1] the village in 1968 applied to the Commission under Section 202(b), 16 U.S.C. 824a(b), to order an interconnection with petitioner, which the village offered to install at its own expense (Pet. App. B 3). Petitioner opposed the request (Pet. App. B 3).

After hearings conducted at petitioner's request, the Commission held first, that the village is a "person" entitled to apply for an interconnection under Section 202(b) and that a temporary, as well as a permanent, interconnection could be ordered under that section (Pet. App. B 7 8). On the merits, the Commission found that the village had a legitimate need for additional generating capacity and that interconnection with petitioner, at least for the short

[1] So long as the load did not exceed the capacity of one generator, the other was available as a reserve. If both generators had to be used to serve the load, there would be no reserve available to meet an outage of one of the generators and the system would not have firm reliability.

[2] An initial decision by the hearing examiner had been waived (Pet. App. B 1).

term,' was justified (Pet. App. B 9). Accordingly, the Commission ordered petitioner to permit, at the village's expense, installation of an interconnection on a temporary basis (Pet. App. B 14-15).[2] On review, the court of appeals upheld the Commission's decision (Pet. App. A 1-9).[3]

ARGUMENT

The decision below properly sustained the Commission's order and is consistent with decisions of this Court and other courts of appeals.

1. Petitioner's contention that a municipally owned distribution system is not a "person" with whom a regulated public utility may be ordered to interconnect under Section 202(b) of Part II of the Act rests on the definitions in Section 3 of Part I of the Act which do not specify municipalities as "persons" and on excerpts from the legislative history of Part II. These arguments, however, have consistently been rejected by the courts. In *United States* v. *Public Utilities Commission*, 345 U.S. 295, 312-313, this Court held that the Section 3 definition of "person" did not limit the Commission's jurisdiction over sales at whole-

[1] The Commission remanded the case to the examiner for a determination of whether a permanent interconnection with petitioner or others would be in the public interest (Pet. App. B 10). The hearings before the examiner on this issue have been completed, but the examiner has not yet rendered his decision.

[2] We have been informed, however, that as of November 17, 1970, the interconnection had not yet been installed, due to financing difficulties experienced by the village.

[3] Mr. Justice Blackmun, who had been a member of the panel that heard the case, did not take part in its disposition (Pet. App. A 1).

sale to municipalities under Section 201 of Part II even though such sales were defined by Section 201(d) as sales of electric energy "to any person for resale." Reviewing the legislative history, the Court found no "conscious coordination" between Sections 3 and 201 and concluded that "neither the legislative aim nor the realities of coordinated rate regulation compel * * *" reading "person" in Section 201 narrowly. 345 U.S. at 313, 316.

That the same reasoning applies in interpreting "person" in Section 202(b), to determine the scope of the Commission's authority to order interconnections, has been recognized by the First and Fifth Circuits as well as the court below. See *New England Power Co. v. Federal Power Commission*, 349 F.2d 258 (C.A. 1); *Florida Power Corp. v. Federal Power Commission*, 425 F.2d 1196, 1201 1203 (C.A. 5), certiorari granted on other issues on October 26, 1970, Nos. 464 and 469, this Term, cross-petitions on other issues pending, Nos. 651 and 652. These decisions, we submit, are patently correct.

2. Petitioner also challenges (Pet. 10, 11) the Commission's conclusion that the requirement of Section 202(b) that no "undue burden" be placed on the utility with whom an interconnection is sought relates to physical burdens, not economic burdens. Petitioner claims that the interconnection with the village will impose an undue economic burden on it as other municipalities, which petitioner serves at retail, may now be encouraged to set up their own distribution systems and then call upon petitioner to supply them

with emergency power at wholesale. The Commission recognized that the effect of the interconnection upon petitioner's financial well being would be relevant in considering, in the second phase of the proceeding now before the hearing examiner, any long term interconnection (Pet. App. B 11 12). While the Commission's interpretation of "undue burden" is sound, the issue is in any event not pertinent to the present case, which involves only a temporary interconnection. The present order cannot reasonably be expected to induce any municipality to establish its own electric system, let alone start a trend that could significantly affect petitioner's operational or financial integrity.

3. The further claim (Pet. 12 13) that petitioner may not be compelled to engage in wholesale business under Section 202(b) because it is in the retail business and has not generally held itself out to provide wholesale service is equally insubstantial. Aside from the fact that the interconnection provisions of Section 202(b) specifically apply to all jurisdictional utilities, including those not making any sales at wholesale, petitioner is incorrect in stating that it has not dedicated its facilities to the type of temporary emergency service ordered here. As the record shows, petitioner is a member of the Upper Mississippi Valley Power Pool, a group of six interconnected utilities, and has arrangements with the pool members and with others for the exchange of emergency power (Pet. App. A 1; J.A. 93–97, 304–305).

"J. A." refers to the joint appendix filed in the court below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE 1970